

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
December 12, 2006 Session

STATE OF TENNESSEE v. TYSON LEE DAY

Appeal from the Criminal Court for Sumner County
No. 286-2005 Jane W. Wheatcraft, Judge

No. M2006-00989-CCA-R3-CD - Filed March 7, 2007

The defendant, Tyson Lee Day, pleaded guilty to charges of driving under the influence (third offense) and driving on a revoked license and received sentences of 11 months, 29 days on the DUI charge and six months on the driving on a revoked license charge, both suspended to 120 days. Prior to the guilty plea, the defendant moved the court to suppress evidence taken during the traffic stop which led to the defendant's arrest. This motion was denied; the resulting plea was taken subject to a certified question of law regarding the issue raised in the defendant's motion. On April 28, 2006, the defendant filed this appeal. Following our review, we reverse the judgment of the trial court and dismiss the indictments.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is
Reversed and Remanded**

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which NORMA MCGEE OGLE, J., and ALAN E. GLENN, J., joined.

David Allen Doyle, District Public Defender; Mike Anderson, Assistant District Public Defender, for the appellant, Tyson Lee Day.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth Marney, Assistant Attorney General; Lawrence Ray Whitley, District Attorney General; Thomas Dean, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

In May 2004 the defendant, Tyson Lee Day, was charged by a Sumner County grand jury with driving under the influence (third offense) and driving on a revoked license. The defendant filed a motion to suppress evidence collected in the traffic stop leading to his arrest; the trial court denied this motion in November 2005. On March 30, 2006, the defendant pleaded guilty to the two offenses. The trial court imposed sentences of 11 months and 29 days, on the DUI charge and six months on the driving on a revoked license charge, suspending both sentences to 120 days. The plea

agreement was entered subject to a certified question of law challenging the validity of the investigatory stop that led to the defendant's arrest. This appeal follows.

FACTS

On the afternoon of May 16, 2004, Officer Jeff Tarkington of the Hendersonville Police Department, on routine patrol, was headed northbound on New Shackle Island Road when he noticed a vehicle traveling southbound flashing its lights. The female driver of the vehicle also waved her arms at the officer and pointed at the vehicle in front of her, a white sports utility vehicle (SUV). The officer stated that, in his opinion, the driver of the vehicle flashing its lights was attempting to get the officer's attention. The officer then made a U-turn and pulled in between the two cars, behind the white SUV and in front of signaling driver's vehicle. The officer then turned on his blue lights and pulled over the SUV. The other driver's vehicle also pulled off the side of the road. Before the officer approached the SUV, he talked briefly with the citizen (who was not identified in the record) to "find out what was going on."

After talking briefly with the citizen, the officer approached the SUV and identified the driver as the defendant, Tyson Lee Day. While the officer spoke with the defendant, the officer claimed he smelled intoxicating beverages emanating from the defendant. The officer conducted field sobriety tests, which the defendant failed. The defendant was then arrested. Shortly after the arrest, the defendant volunteered a blood sample that revealed the defendant's blood alcohol content to be .25, over three times the legal limit of .08.

ANALYSIS

Both the Fourth Amendment to the United States Constitution and Article I, Section 7 of the Tennessee Constitution prohibit unreasonable searches and seizures by law enforcement officers. The purpose of these constitutional provisions is to "safeguard the privacy and security of individuals against arbitrary invasions of government officials." Camara v. Mun. Ct., 387 U.S. 523, 528 (1967). Consequently, "a warrantless search or seizure is presumed unreasonable, and evidence discovered as a result thereof is subject to suppression unless the State demonstrates that the search or seizure was conducted pursuant to one of the narrowly defined exceptions to the warrant requirement." State v. Binette, 33 S.W.3d 215, 218 (Tenn. 2000) (quoting State v. Yeargan, 958 S.W.2d 626, 269 (Tenn. 1997)).

One exception to the warrant requirement is an investigatory stop based on reasonable suspicion, which is deemed less intrusive than an arrest. Terry v. Ohio, 392 U.S. 1, 27-28 (1968). Reasonable suspicion is "a particularized and objective basis for suspecting the subject of a stop of criminal activity," Binette, 33 S.W.3d at 218 (citing Ornelas v. United States, 517 U.S. 690, 696 (1996)) and is "determined by considering the totality of circumstances surrounding the stop." Id. (citing Alabama v. White, 496 U.S. 325, 330 (1990)). In making an investigatory stop, the officer's reasonable suspicion must be supported by "specific and articulable facts which, taken together with rational inferences, reasonably warrant that intrusion." Terry, 392 U.S. at 21; State v. Pulley, 863

S.W.2d 29, 32 (Tenn. 1993) (citing White, 496 U.S. at 330)). In other words, “[t]he officer . . . must be able to articulate something more than an inchoate and unparticularized suspicion or hunch.” Yeargan, 958 S.W.2d at 632.

Furthermore, because our supreme court has held that an officer’s turning on his vehicle’s blue lights initiates a stop and seizes the subject of the stop within the meaning of the federal and state constitutions, Pulley, 863 S.W.2d at 30, the officer must, prior to turning on his blue lights, “have reasonable suspicion, supported by specific facts, that the [driver] had committed, or was about to commit, a criminal offense” for the stop to be constitutionally valid. Binette, 33 S.W.3d at 218; State v. Garcia, 123 S.W.3d 335, 344 (Tenn. 2003).

The state contends, and this court agrees, that in Tennessee, our appellate courts have often upheld the validity of traffic stops based in part on the basis of citizen complaints. However, in the instant case, there was no complaint; the driver who signaled the officer did not communicate any specific information regarding her concern over the defendant’s driving to the officer before the officer initiated the stop. Furthermore, because the officer initiated the stop shortly after being signaled by the citizen and pulling behind the defendant’s vehicle, the officer did not observe any suspicious behavior on part of the defendant. These two facts make this case contradictory to many of the citizen informant cases in which the witness made a complaint which was followed by (or in one case, preceded by) the officer’s own independent observations of activity that would have justified a vehicle stop. See generally State v. Harold Russell Gregory, No. M2002-01461-CCA-R3-CD, 2003 WL 21766250 (Tenn. Crim. App. Jul. 29, 2003) (search held valid where complainant notified dispatch about possible drunk driver; dispatch relayed this information to officer, who located driver and pulled over driver after seeing driver cross double yellow line); State v. James Michael Davis, No. E2001-01656-CCA-R3-CD, 2002 WL 1971847 (Tenn. Crim. App. Aug. 26, 2002) (search held valid where officer witnessed vehicle parked late at night in area known for prostitution and illicit drug activity; officer saw woman leaning into car window, and after driver pulled away, woman motioned at officer to pursue defendant, which he did); State v. Michael K. Clark, No. 01C01-9802-CC-00087, 1999 WL 38435 (Tenn. Crim. App. Jan. 29, 1999) (stop valid when, following store owner’s complaint of intoxicated driver, officer witnessed driver commit two other traffic violations). In short, unlike the officers in the cases cited above, the officer here based his stop of the defendant on an “unparticularized suspicion or hunch,” the very behavior explicitly prohibited in Yeargan. This difference of facts renders the state’s reliance on cases such as the ones cited above rather ineffective.

Our supreme court has held that “facts forming the basis for an officer’s reasonable suspicion need not rest upon the personal knowledge or observation of the officer.” State v. Simpson, 968 S.W.2d 776, 780 (Tenn. 1998). In fact, our appellate courts have upheld the validity of traffic stops based solely upon the observations of citizen complainants. In some of these cases, the complainant was a confidential informant. The Tennessee Supreme Court has recognized the potential dangers of confidential informant tips and has reacted accordingly:

When a stop is based on the tip of an informant, however, the danger of false reports, through

police fabrication or from vindictive or unreliable informants, becomes a concern. Thus, both state and federal courts have developed tests for determining the reliability of informants' tips. In the context of "probable cause" determinations, Tennessee law requires a showing of both the informant's credibility and his or her basis of knowledge.

Pulley, 863 S.W.2d at 31. However, in this case, the citizen who signaled the officer did not communicate a complaint or tip to the officer; thus, the officer had no way to reasonably assess the citizen's credibility or her basis of knowledge, as is required.

In Simpson, the Tennessee Supreme Court applied the two-pronged Pulley test to uphold a vehicle search based on a confidential informant's tip. In that case, the informant notified a McNairy County sheriff's deputy with whom he had previously worked that two men, one identified by the informant and an unknown man, were transporting 100 Dilaudid pills from Memphis to McNairy County. Simpson, 968 S.W.2d at 777. The informant told the deputy that the men were traveling from Memphis on state Highway 64 in a two-door, beige or cream-colored Oldsmobile, and that they would be arriving in the town of Selmer at any minute. Id. Based upon the detailed information supplied by the informant—the make and color of the car, the identity of one of the occupants, the contents of the car, and the fact that the car would be arriving in a particular place shortly—the court upheld the validity of the stop on the basis that the information was enough to establish the informant's basis of knowledge as reliable. Id. at 782-83.

In cases where the complainant was not a confidential informant, our courts have upheld the validity of stops where the complainant, prior to the stop, gave the officer enough information so that the totality of circumstances favored the officer's making the stop. See generally State v. David Long, No. W2003-02522-CCA-R3-CD, 2005 WL 525267 (Tenn. Crim. App. Mar. 4, 2005) (store supervisor gave 911 dispatcher a detailed description of a person in a yellow truck going from store to store buying medicines routinely used to make methamphetamine; court held that these facts were specific and articulable enough to create reasonable suspicion necessary to validate stop); State v. Fred Taylor Smith, No. W2002-02199-CCA-R3-CD, 2003 WL 22309485 (Tenn. Crim. App. Oct. 8, 2003) (store clerk who refused to serve apparently intoxicated customer witnessed customer leave the store; clerk followed customer in his car and called 911, detailing customer's erratic driving to dispatcher. Information held to prove valid basis for subsequent traffic stop by officer.). Simpson, Long, Smith, and similar cases make clear that should a complainant, identified or confidential, provide law enforcement with "specific and articulable facts" upon which an officer could, in light of the totality of circumstances, reasonably determine that an investigatory stop of the suspect's vehicle is warranted, the stop will not be seen as an unreasonable search and seizure under either the Fourth Amendment or the Tennessee Constitution—provided the officer has such knowledge prior to turning on his blue lights and initiating the stop.

However, such was not the case here. In the instant case, the officer did not, at the time he pulled over the defendant's vehicle, possess enough information upon which an officer could reasonably suspect that the defendant had committed or was about to commit a criminal offense. Prior to pulling over the defendant's vehicle, the only communication between the officer and the

other driver consisted of the driver's flashing her lights at the officer and gesturing toward the defendant's vehicle. At the time the officer pulled over the defendant, the officer knew nothing about either driver or about the nature of the citizen's concern regarding the defendant. Without speaking to the unknown citizen, the officer was unable to assess or establish her reliability or the basis for her knowledge of the defendant's supposed offense—or if the other driver even knew anything about the defendant. The two required elements to be established under Pulley were clearly missing in this case.

Had the officer spoken to the citizen before pulling over the defendant's vehicle, this court may well have reached a different decision. However, the officer did not speak to the citizen and gather the requisite information necessary to create a reasonable suspicion until after the officer pulled over the defendant's vehicle—a clear violation of the Pulley-Binette mandate that such reasonable suspicion be created before the officer switches on his blue lights.

Finally, this court notes that the instant case can be factually distinguished from another of our opinions in which we upheld a traffic stop which resulted from a vehicle flashing its headlights. In State v. Dennis R. Jenkins, No. M2002-01702-CCA-R3-CD, 2003 WL 21523247 (Tenn. Crim. App. June 30, 2003), a police officer stopped a vehicle that was driving down a highway on a clear, sunny day, flashing its headlights. 2003 WL 21523247 at *1. As the officer questioned the driver why he was flashing his headlights, the officer noticed in plain view on the seat next to the driver two aluminum foil balls with burn residue on them. Id. After a more thorough search of the vehicle revealed additional substances, which proved to be illegal drugs, the defendant was arrested. Id. The resulting conviction was upheld for two reasons. First, the traffic stop was valid because the police officer stopped the driver for flashing his lights, a violation of Section 55-9-402(a)(1) of the Tennessee Code Annotated. Id. at *2, *4. Additionally, the officer pulled over the driver because the officer was concerned over the safety of the driver flashing his lights. Id. at *4. The holding in Jenkins suggests that the trooper in the instant case could have properly stopped the vehicle flashing its lights either for a statutory violation or concern over that particular driver's safety. However, absent the conditions outlined above, the trooper could not have stopped any other vehicle, including the defendant's.

CONCLUSION

At the time the officer initiated the traffic stop, he lacked knowledge upon which one could reasonably suspect that the defendant had committed or was about to commit an offense. As such, the stop was a violation of the defendant's protection against unreasonable search and seizure as established in the federal and state constitutions. Therefore, we reverse the judgment of the trial court and grant the defendant's motion to suppress. Because our ruling is dispositive we also dismiss the indictments against the defendant.

D. KELLY THOMAS, JR., JUDGE